State of Rhode Island and Providence Plantations

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

December 9, 2016
PR 16-49

Ms. Lynn Farinelli

RE: Farinelli v. City of Pawtucket

Dear Ms. Farinelli:

The investigation into your Access to Public Records Act ("APRA") complaint filed against the City of Pawtucket ("City") is complete. By email correspondence dated March 29, 2016, you alleged that the City violated the APRA when it improperly denied your APRA request dated November 30, 2015, wherein you sought the "narratives for the last 10 death cases the PPD [Pawtucket Police Department] classified as 'suicide.'" According to the City's December 14, 2015 denial, your APRA request was denied on the basis that "public disclosure of the reports could reasonably be expected to constitute an unwarranted invasion of personal privacy."

In response to your complaint, we received a substantive response from the Solicitor for the City, Frank J. Milos, Jr., Esquire. Attorney Milos states, in pertinent part:

> "On November 30, 2015, Mrs. Farinelli emailed an APRA request seeking the 'narratives for the last 10 death cases the PPD classified as 'suicide.'"
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> On December 14, 2015, the City provided a written response to Mrs. Farinelli denying her request. * * *
>
> In her complaint, Mrs. Farinelli states that because the City released [a prior report to her regarding an investigation into a specific suicide] the City must now release in redacted form police narrative reports into the investigations of ten other death cases, which the Pawtucket Police Department classified as suicides.
>
> The Pawtucket Police Department has informed me that the ten narrative reports being sought have not been previously released to any member of the public.

> Although Mrs. Farinelli may have a personal interest in obtaining the narrative reports, the City fails to see how release of the reports, even in redacted form, would serve to shed light on the official act and workings of government, or on how the Pawtucket Police Department operates. The City contends that the public's interest in disclosure of the narrative reports in question, even in redacted form, is negligible."

We acknowledge your rebuttal dated May 24, 2016.

At the outset, we note that in examining whether a violation of the APRA has occurred, we are mindful that our mandate is not to substitute this Department's independent judgment concerning whether an infraction has occurred, but instead, to interpret and enforce the APRA as the General Assembly has written this law and as the Rhode Island Supreme Court has interpreted its provisions. Furthermore, our statutory mandate is limited to determining whether the City violated the APRA. See R.I. Gen. Laws § 38-2-8. In other words, we do not write on a blank slate.

The APRA states that, unless exempt, all records maintained by any public body shall be public records and every person shall have the right to inspect and/or to copy such records. See R.I. Gen. Laws § 38-2-3(a). The APRA's stated purpose is both "to facilitate public access to public records" and "to protect from disclosure information about particular individuals maintained in the files of public bodies when disclosure would constitute an unwarranted invasion of personal privacy." R.I. Gen. Laws § 38-2-1. Among the APRA exemptions is R.I. Gen. Laws § 38-2-2(4)(i)(D), which exempts from disclosure "[a]ll records maintained by law enforcement agencies for criminal law enforcement and all records relating to the detection and investigation of crime, including those maintained on any individual or compiled in the course of a criminal investigation by any law enforcement agency," provided the disclosure of such records "(c) could reasonably be expected to constitute an unwarranted invasion of personal privacy." The United States Supreme Court, the Rhode Island Supreme Court, and this Department have exhaustively examined R.I. Gen. Laws § 38-2-2(4)(i)(D)(c), or its Freedom of Information Act (FOIA) counterpart, Exemption 7(C).

The United States Supreme Court has made clear that the FOIA:

> focuses on the citizens' right to be informed about 'what their government is up to.' Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about

> the agency's own conduct. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773, 109 S.Ct. 1468, 1481-82 (1989).[1]

The Court further explained that:

> the FOIA's central purpose is to ensure that the Government's activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the Government be so disclosed. Thus, it should come as no surprise that in none of our cases construing the FOIA have we found it appropriate to order a Government agency to honor a FOIA request for information about a particular private citizen. Id. at 774-75, 109 S.Ct. at 1482 (emphases in original).

The plain language of R.I. Gen. Laws § 38-2-2(4)(i)(D)(c) contemplates a "balancing test" whereby the "public interest" in disclosure is weighed against any "privacy interest." Consequently, we must consider the "public interest" versus the "privacy interest" to determine whether the disclosure of the requested records, in whole or in part, "could reasonably be expected to constitute an unwarranted invasion of personal privacy." R.I. Gen. Laws § 38-2-2(4)(i)(D)(c). The APRA further provides, in pertinent part, that "[a]ny reasonably segregable portion of a public record excluded by subdivision 38-2-2(4) shall be available for public inspection after the deletion of the information which is the basis of the exclusion." See R.I. Gen. Laws § 38-2-3(b).

Here, we begin with the privacy interest. It is beyond debate that the deceased individuals identified in the ten (10) requested reports have no privacy interest as "the right to privacy dies with the person." Clift v. Narragansett Television L.P., 688 A.2d 805, 814 (R.I. 1996). Nevertheless, this does not end our inquiry concerning whether any other individuals identified in the requested reports have a privacy interest.

The United States Supreme Court has considered this precise issue and has expressly determined that when balancing the privacy interest versus the public interest, the privacy interest of the decedent's family must be considered. See National Archives and Records Administration v. Favish, 541 U.S. 157, 171 (2004). See also The Providence Journal v. Department of Public Safety, 136 A.3d 1168, 1175 (R.I. 2016)(adopting Favish standard). This is perhaps a greater consideration in this case since, unlike Favish, the requested reports identify surviving family

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[1] The Rhode Island Supreme Court has stated that "[b]ecause [the] APRA generally mirrors the Freedom of Information Act, 5 U.S.C.A. § 552 (West 1977), we look to federal case law interpreting FOIA to assist in our interpretation of the APRA." Teacher's Alliance Local No. 920 v. Brady, 556 A.2d 556, 558 n.3 (R.I. 1989).

members.[2] Even Rhode Island case law appears to recognize some measure of extension of privacy interests to the family of a decedent. See Clift, 688 A.2d at 815 ("[T]he reporter's conversation with the decedent did not, however, rise to the level of an actionable intrusion into the Clift's family's seclusion."). Furthermore, this Department has previously determined that law enforcement records pertaining to a particular individual's suicide were exempt from public disclosure based on the surviving family member's privacy rights. See Casey v. Johnston Police Department, PR 02-02. As such, based on this precedent and the plain language of the APRA, we must examine the personal privacy rights that the surviving family members, as well as those identified in the reports, have in the contents of the investigation records.

There can be little doubt that these reports – in an unredacted manner – implicate significant privacy interests of the surviving family members. Indeed, while Favish examined photographs of a suicide whereas this case concerns investigative reports of suicides – Favish's recognition of a "well-established cultural tradition acknowledging a family's control over the body and death images of the deceased has long been recognized at common law" is instructive to this case. Favish, 541 U.S. at 168. See also id. at 167 ("We have little difficulty, however, in finding in our case law and traditions the right of family members to direct and control disposition of the body of the deceased and to limit attempts to exploit pictures of the deceased family member's remains for public purposes.").

You recognize this privacy interest, but suggest that the surviving family members' privacy interest can be addressed through redaction. Having reviewed the requested documents, in camera, we disagree. As explained above, the privacy interests implicated belong not to the decedent, but to the decedents' families. As such, to protect these privacy interests, redaction would have to include the identities of all family members and the events or circumstances investigated. Based upon our in camera review of the requested documents, without redacting the events or circumstances investigated, we find that these unredacted events and circumstances would easily lead to the identification of the persons whose identities have been redacted and whose privacy interest must be protected. In reaching this conclusion is not lost upon this Department that the nature of the documents requested – investigation reports regarding the last ten (10) suicides – contain graphic and emotional content for a surviving family member and sometimes vividly describes the nature, method, and motivation for the suicide. See Casey, PR 02-02 ("our examination of the requested documents reveals that the instant records describe the suicide scene, sometimes in graphic detail, as well as the other circumstances attendant to the suicide"). The privacy interest in the disclosure of these reports is significant. See Favish, 541 U.S. at 170 ("Our holding ensures that the privacy interests of surviving family members would allow the Government to deny these gruesome requests in appropriate cases.")(suicide photos); New York Times Co. v. NASA, 782 F.Supp. 628, 631, 632 (D.D.C. 1991)(sustaining families'

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[2] See e.g. Kimberlin v. Department of Justice, 139 F.3d 944, 949 (D.C. Cir. 1998)("It goes almost without saying, moreover, that individuals other than [the subject of the investigation] whose names appear in the file retain a strong privacy interest in not being associated with an investigation involving professional misconduct.").

privacy claim with respect to an audiotape of the Space Shuttle Challenger astronauts last words because "[e]xposure to the voice of a beloved family member immediately prior to that family member's death . . . would cause the Challenger families pain" and inflict "a disruption [to] their peace of mind every time a portion of the tape is played within their hearing").

Balanced against this significant privacy interest we must consider the public interest in disclosure. As described by you, "[t]his is very much a Public Interest [because t]he Public should be able to see how the PDD does their Job or DOESN'T do the JOB they are paid to perform." Your rebuttal continues that "[t]he Public needs to be able to receive documents when they question the goings on in the City" and that "[t]he Public has a RIGHT to know if these cases are being handled properly."

In Favish, the United States Supreme Court considered a similar public interest argument with respect to certain photographs depicting the condition of a decedent's body at the suicide scene. In so doing, the Court stated that "[t]he term 'unwarranted' requires us to balance the * * * privacy interest against the public interest in disclosure." Favish, 541 U.S. at 171. To effectuate this balance, the Court provided a two-step process by which a citizen must prove that it is entitled to disclosure of the records. Specifically, the Court provided that: "First, the citizen must show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake. Second, the citizen must show the information is likely to advance that interest. Otherwise, the invasion of privacy is unwarranted." Id. at 172.

Favish continued to explain that:

> "[W]here there is a privacy interest * * * and the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requester must establish more than a bare suspicion in order to obtain disclosure. Rather, the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." Id. at 174. See Providence Journal, 136 A.3d at 1175 (adopting Favish standard).

Here, we have great doubt that you have satisfied this burden. As best as we can tell, you take no issue – and certainly present no evidence – that the Pawtucket Police Department improperly investigated any of the matters contained in the requested ten (10) reports. Rather, it appears that you seek these documents because you claim that the Pawtucket Police Department mishandled another separate incident relating to the matter previously disclosed to you and because "[t]he Public Has a RIGHT to know if these cases are being handled properly." Whether the Pawtucket Police Department did or did not mishandle this previous incident is far beyond the scope of this finding and we expressly do not address this issue, but what is clear is that how the Pawtucket Police Department investigated the incidents that are the subject of your APRA request have

little bearing on how the Pawtucket Police Department investigated this prior incident.[3] Indeed, with respect to the ten (10) reports you have presented no evidence that "responsible officials acted negligently or otherwise improperly in the performance of their duties." Favish, 541 U.S. at 174. At the very least, even if we assume you satisfied the Favish standard and presented evidence that disclosure would advance some public interest, case law and our in camera review makes clear that in this case, and based upon the evidence presented, the privacy interests outweigh the public interest and no reasonable segregable portion can be provided. See R.I. Gen. Laws § 38-2-3(b); Providence Journal, 136 A.3d at 1178 ("In the case of the documents developed by law enforcement in the investigation of a private individual, the privacy interest is considerable and should not be easily displaced absent a particularly noteworthy public interest.").

Two other points warrant discussion. In The Rake v. Gorodetsky, 452 A.2d 1144 (R.I. 1982) and Direct Action for Rights and Equality v. Gannon, 713 A.2d 218 (R.I. 1998), the Rhode Island Supreme Court determined that certain documents relating to civilian complaints against police officers were public records, after the identities of the officers and civilians were redacted. Because these reports spanned several years, the records were suspectible to redaction; and while the Court recognized that even the redacted reports could be matched with publicly available information to identify the individuals whose identities had been redacted, the Court held that "on balance the public's right to know outweighs such a possibility." The Rake, 452 A.2d at 1149. Over a decade later when the Court reviewed a similar denial involving civilian complaints against police officers, the Court reached a similar conclusion and explained that "the manner in which a law enforcement agency addresses the concerns of its citizens regarding civilian complaints 'relat[es] to management and direction of a law enforcement agency.'" DARE, 713 A.2d at 224. Because of this last determination, the Court held that the redacted documents were a public record under the APRA provision providing that records related to the management and direction of a law enforcement agency were a public record. Id. ("records relating to management and direction of a law enforcement agency and records reflecting the initial arrest of an adult and the charge or charges brought against an adult shall be public")(quoting R.I. Gen. Laws § 38-2-2(d)(4)).

We acknowledge that your suggestion that the reports at issue could be redacted had some initial appeal to us, however, our further examination finds the specific facts at issue are distinguishable from The Rake and DARE. Specifically, the time span (or number of documents at issue)

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[3] If the evidence suggested that the Pawtucket Police Department handled all investigations pursuant to a common protocol, we might see the value in obtaining documents concerning this protocol, but you do not seek records concerning any particular protocol or policy, but rather seek the investigative reports. Even your rebuttal asserts that the Pawtucket Police Department did not follow its policy or procedure when investigating this prior incident. See also Boyd v. Criminal Division of the United States Department of Justice, 475 F.3d 381, 388 (D.C. Cir. 2007)("a single instance of a Brady violation in Boyd's case would not suffice to show a pattern of government wrongdoing as could overcome the significant privacy interest at stake").

appears to be far smaller in this case than in The Rake and DARE: the reports detailing the last ten (10) suicides versus the last seven (7) years of civil complaints. Under these circumstances, if we directed the ten (10) reports at issue to be disclosed with only the identities of family members and the decedent redacted, the underlying events and circumstances could readily be matched with publicly available information to reveal the identities of the redacted family members. It is for this reason we noted, supra, that the requested records would need to redact not only the family members' identities, but also the events that could lead to identifying family members. See Direct Action for Rights and Equality v. Gannon, 819 A.2d 651, 663 (R.I. 2003)("redactable information should include any information that directly could identify a complainant or officer against whom a complaint was made"). As such, this case more closely resembles Brady (where one specific report was at issue and the document was exempt) than The Rake or DARE (where several years of reports were at issue and the documents were disclosed in a redacted manner).

We are also cognizant that the nature of the records at issue in this case – reports detailing suicides of private citizens – compared to the nature of the records at issue in The Rake and DARE – allegations of police misconduct – justifies our determination. See United States Department of Justice v. Reporters Committee for Freedom of the Press, 109 S.Ct. 1468, 1485 (1989)("we hold as a categorical matter that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that when the request seeks no 'official information' about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is 'unwarranted'"). Indeed, the Rhode Island Supreme Court's determination that the records at issue in DARE fell within the provision mandating the disclosure of records relating to the management and direction of a law enforcement agency was a significant basis for its determination in that case. See DARE, 713 A.2d at 224. Our conclusion in this case is particularly appropriate considering that the persons whose privacy would be invaded have absolutely no connection to the prior case or to the public interest you are seeking to advance. These individuals are private citizens and "[i]n this class of cases where the subject of the documents 'is a private citizen,' 'the privacy interest . . . is at its apex.'" Favish, 541 U.S. at 166.

Second, you have explained that in a prior case the Pawtucket Police Department released a similar document as a "public record" and that "others should be public record as well." While our prior findings are typically relied upon by this Department for precedential value, the prior determination you reference to release a document was made by the Pawtucket Police Department and not this Department. Respectfully, the Pawtucket Police Department's prior determination is not binding upon this Department and has no precedential value.[4] For this

[4] We are unaware of the precise circumstances that the Pawtucket Police Department released this prior document. Under the APRA, a public body may release a document even if the document is exempt from public disclosure, subject to some legal authority requiring confidentiality and/or an invasion of privacy claim. See In re New England Gas Co., 842 A.2d 545, 547 (R.I. 2004)(APRA "does not provide a remedy to prevent public agencies from

reason, as well as the reasons identified in footnote 3, the Pawtucket Police Department's prior disclosure of a similar document does not alter our analysis.

Although the Attorney General will not file suit in this matter, at this time, nothing within the APRA prohibits an individual or entity from obtaining legal counsel for the purpose of instituting injunctive or declaratory relief in Superior Court. See R.I. Gen. Laws § 38-2-8(b). Please be advised that we are closing this file as of the date of this letter.

We thank you for your interest in keeping government open and accountable to the public.

Very truly yours,

Lisa A. Pinsonneault
Special Assistant Attorney General

LP/kr

Cc: Frank Milos, Esq.

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disclosing records"). Moreover, under different circumstances, the Rhode Island Superior Court has held that documents – specifically mailing addresses – were exempt from public disclosure even though the same agency had previously disclosed the mailing addresses. See Fuka v. Department of Environmental Management, PC 07-1050 (R.I. Superior, filed April 17, 2007)(Indeglia, J.). This precedent makes clear that any waiver argument must fail.